Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

CHANI LIGHTMAN,

Petitioner,

v.

RABBI TZVI FLAUM and
RABBI DAVID WEINBERGER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Abe H. Konstam, Esq.
Counsel of Record
Mallow, Konstam & Hager, P.C.
321 Broadway
New York, New York 10007
(212) 964-7990

Counsel for Petitioner

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PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

1. The New York Court of Appeals granted immunity from suit to a member of the clergy who disclosed confidences recognized as privileged under state statute, in conflict with other state court decisions permitting a breach-of-fiduciary claim against clergy members who disclose confidences. Under this Court's First Amendment jurisprudence, an individual's religious beliefs do not excuse noncompliance with an otherwise valid state law, and to hold otherwise grants an impermissible preference to religious leaders. Should the Petition be granted to settle an important federal constitutional question raised by the New York Court of Appeals' decision granting immunity to clergy who breach a fiduciary relationship recognized under state statute by improperly disclosing confidences?

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported in the official New York case reporter at 97 N.Y.2d 128 and in the West reporters at 761 N.E.2d 1027 and 736 N.Y.S.2d 300. (App. A1.) The opinion of the New York Supreme Court, Appellate Division, is reported in the official New York case reporter at 278 A.D.2d 373 and in the West reporter at 717 N.Y.S.2d 617. (App. A21.) The opinion of the Supreme Court, Queens County, New York is reported in the official New York case reporter at 179 Misc.2d 1007 and in the West reporter at 687 N.Y.S.2d 562. (App. A61.)

JURISDICTION

The New York Court of Appeals entered a final decision in this case on November 27, 2001. (App. 1.) This Court has jurisdiction over this case under 28 U.S.C. § 1257(a) because the New York Court of Appeals' decision calls into question the enforcement and validity of a New York Statute, N.Y. CPLR § 4505, on the grounds that it is repugnant to the First Amendment of the United States Constitution and the Respondents' alleged immunity from suit is based on the First Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

New York CPLR section 4505:

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed (to) disclose a confession or confidence made to him in his professional character as spiritual advisor.

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STATEMENT

This dispute arose after Petitioner Chani Lightman sought spiritual guidance and counseling from two rabbis, Respondents Tzvi Flaum ("Flaum") and David Weinberger ("Weinberger"). Relying on the confidential relationship between a clergy member and a person seeking spiritual guidance as recognized by New York law, Chani Lightman shared personal confidences to Flaum and Weinberger. Flaum and Weinberger disclosed those confidences to Chani Lightman's husband and in a court proceeding without Chani Lightman's approval.

A. Chani Lightman Confides in Two Rabbis, Who Are Obligated by New York Law To Keep Their Discussions Confidential But Disclose Confidences Without Chani Lightman's Permission.

After being married to her husband, Hylton Lightman, for fifteen years, Petitioner Chani Lightman began a divorce proceeding in February of 1996. (App. A1-2.) As part of that proceeding, she sought temporary custody of the couple's four children. (App. A2.) In opposing that request, Hylton Lightman submitted under seal affirmations from two rabbis in an apparent effort to demonstrate that his wife was not following Orthodox Jewish religious law and that granting her custody would threaten the children's upbringing. (App. A2.)

Rabbi Flaum, who was associated with the synagogue the Lightmans attended, stated in his sealed affirmation that Chani Lightman had advised him that she had stopped

engaging in "religious purification laws" and was "seeing a man in a social setting." (App. A2.) A friend of the Lightmans, Rabbi Weinberger, stated in his sealed affirmation that Chani Lightman had told him that "she freely stopped her religious bathing so [that] she did not have to engage in any sexual relations" with her husband. (App. A2.) Weinberger also stated that, in his opinion, Chani Lightman no longer wanted "to adhere to Jewish law despite the fact that she is an Orthodox Jew and her children are being raised Orthodox as well." (App. A2-3.)

B. Chani Lightman Sued Weinberger and Flaum for Breach of Fiduciary Duty Based on Their Illegal Disclosure of Confidential Information.

Chani Lightman then filed this action in the Supreme Court, Queens County, New York, asserting causes of action for breach of fiduciary duty in violation of New York CPLR section 4505, which codifies the "clergy-penitent privilege,"[1] and intentional infliction of emotional distress against both rabbis and defamation against Weinberger. (App. A3.) In support of her claims, Chani Lightman made it clear she expected that the personal information she disclosed to them would remain confidential and that she never waived the confidentiality of that information. (App. A5.)

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[1] While this privilege is sometimes described as the "priest- penitent" privilege, "clergy-penitent" privilege, "minister-penitent" privilege, "cleric-congregant" privilege, and "clergy-communicant" privilege, the term "clergy-penitent privilege" will be used throughout this Petition.

C. The Trial Court Recognized That Flaum and Weinberger's Illegal Disclosure Gave Rise to a Breach-of-Fiduciary-Duty Claim.

Flaum and Weinberger moved to dismiss the complaint, contending that their disclosure of confidential information in violation of CPLR section 4505 did not give rise to a private cause of action for breach of fiduciary duty, that Chani Lightman's allegations were insufficient to sustain a claim for intentional infliction of emotional distress, and that Weinberger's statements were merely an opinion that did not give rise to a claim for defamation. (App. A3-4.) Flaum and Weinberger also asserted that dismissal of the fiduciary-duty claim was required by the First Amendment of the United States Constitution because their disclosure of Chani Lightman's confidences was required under Jewish law. (App. A3.)

In support of this allegation, Flaum submitted two additional affirmations regarding his discussions with the Lightmans. (App. A4.) Flaum claimed that Hylton Lightman had revealed his marital difficulties more than two years before Chani Lightman came to him, and that his conversation with Hylton Lightman prompted Chani Ligthman's mother to ask him to speak with her daughter. (App. A4.) He also alleged that Chani Lightman admitted to him that she had discontinued her religious purification rituals and that she was socializing with men other than her husband. (App. A4.) Flaum maintained that Chani Lightman's statements to him were not confidential because she never requested spiritual guidance. (App.A4-5.)

In his affirmation, Flaum also contended that, under Jewish law, he was obliged to relay such information to

Hylton Lightman to prevent him from engaging in sexual relations with his wife in violation of the Torah, and to protect the couple's children from exposure to Chani Lightman's allegedly improper conduct. (App. A4-5.) Weinberger similarly claimed that he was obligated to disclose his conversations with Chani Lightman. (App. A5.)

The New York trial court granted partial summary judgment dismissing Chani Lightman's defamation claim but found that the emotional distress and fiduciary duty claims were viable. (App. A61.) The trial court specifically concluded that a violation of New York CPLR 4505 was actionable as a breach of a fiduciary duty of confidentiality and that there were no First Amendment implications raised by the facts. (App. A82-83.)

D. The New York Appellate Division Dismissed the Fiduciary-Duty Claim, But Two Dissenting Justices Concluded That the First Amendment Did Not Bar Such a Claim.

The New York Supreme Court, Appellate Division, Second Department, modified that order by dismissing the fiduciary duty and emotional distress causes of action. (App. A21.) The Appellate Division found that Chani Lightman failed to demonstrate that she had not waived the clergy-penitent privilege by having third parties present during her meetings with Weinberger and Flaum and therefore declined to address whether a claim for breach of fiduciary duty existed under CPLR section 4505. (App. A24-25.)

Two Justices of the Appellate Division dissented, in part, and stated that they would have sustained the

breach-of-fiduciary-duty claims, leaving the waiver issue as a question of fact. (App. A25.) The dissenting justices concluded that a breach of CPLR section 4505 gives rise to a claim for breach of fiduciary duty because such a claim is available under analogous statutory provisions requiring that communications be kept confidential and that no First Amendment issues were raised by the neutral application of the statute. (App. A60-61.)

E. The New York Court of Appeals Held That No Claim for Breach of Fiduciary Duty Could be Made Against a Clergy Member for Violation of the Clergy-Penitent Privilege.

Chani Lightman appealed to the New York Court of Appeals as a matter of right, and the Court of Appeals affirmed the Appellate Division's dismissal of all the claims. The Court of Appeals' decision turned on whether the fiduciary relationship recognized by section 4505 the other confidential relationships identified in Article 45 of the CPLR, such as the attorney-client and physician-patient relationships. (App. A11-12.)

Purporting to base its decision in part on New York state law, the Court of Appeals held that the statutory privilege itself did not give rise to claims for breach of fiduciary duty and that for such a claim to arise, it had to be grounded in the common law or some other source. (App. A8-16.) The Court of Appeals also noted that clergy were different from other classes of professionals subject to confidentiality restrictions, because other professionals were subject to state regulation, while clergy could engage in religious activities without state oversight. (App. A12-16.)

The Court of Appeals acknowledged that the claim did raise First Amendment issues and noted, contrary to the dissenting justices in the Appellate Division, that allowing Chani Lightman's claim to proceed would "raise troubling constitutional implications" and force the court to interpret religious requirements. (App. A17.)

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the New York Court of Appeals has impermissibly exempted clergy members from compliance with state law. New York created a statutory scheme recognizing privileges attaching to certain confidential relationships, including the attorney-client relationship, the physician-patient relationship, the psychologist-patient relationship, the social-worker-client relationship, and the clergy-penitent relationship. Under New York law, all those confidential relationships give rise to a cause of action for breach of fiduciary duty, with one new exception. The New York Court of Appeals held that clergy members could disclose a penitent's confidences without being held liable. This granting of immunity to clergy members is incompatible with this Court's First Amendment jurisprudence, which makes it clear that religious leaders may not be excused from compliance with otherwise valid state laws.

POINT I THE PETITION SHOULD BE GRANTED TO SETTLE AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE NEW YORK COURT OF APPEALS' DECISION GIVING IMMUNITY FROM SUIT TO CLERGY WHO BREACH A FIDUCIARY RELATIONSHIP RECOGNIZED UNDER STATE STATUTE BY IMPROPERLY DISCLOSING CONFIDENCES.

The Petition raises important constitutional issues. Nearly every jurisdiction recognizes some form of the clergy-penitent privilege, and New York has created a clergy-penitent privilege as part of a statutory scheme recognizing privileges arising from specific confidential

relationships. While New York recognizes a private right of action arising from other statutory privileges, the New York Court of Appeals' decision has set apart the clergy-penitent privilege by immunizing clergy members from any liability for violations of that privilege. This decision has impermissibly placed clergy members in a preferred legal position, a result that cannot be reconciled with this Court's First Amendment jurisprudence.

A. Every State Recognizes Some Form of Clergy-Penitent Privilege.

The clergy-penitent privilege has its historical roots in the Roman Catholic sacrament of Penance. It has been expanded beyond the priest-penitent relationship by rule and statute to encompass communications made in confidence to a spiritual advisor. The Petition raises significant issues, in part, because every state and the District of Columbia have conferred some degree of privilege on confidential communications between a clergy member and a penitent.

1. The Historical Roots of the Clergy-Penitent Privilege.

The clergy-penitent privilege has its historical underpinnings in the canons of Catholicism, which require the confession of sins to a priest who is forbidden by canon law from disclosing the substance of those communications. *See* Alexander, *Practice Commentaries, McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 4505, at 683.) Because English courts stopped recognizing the privilege after the Reformation, the clergy-penitent privilege is generally considered to be outside the scope of common law. *See, e.g., Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226,

229 (1979). While Jewish law has no direct analogy to the confessional, all Jews, rabbis and lay persons alike, are required to follow the biblical admonishment that "thou shalt not go up and down as a talebearer among thy people." Leviticus 19:16. Because modern clergy of all faiths are often called upon to counsel troubled individuals, legislatures and courts have extended the traditional priest-penitent privilege to encompass spiritual counselors of all faiths.

2. All of the States Have Enacted a Form of the Modern Clergy-Penitent Privilege.

All of the states as well as the District of Columbia recognize some form of clergy-penitent privilege. Federal courts also recognize a common law clergy privilege under Federal Rule of Evidence 501. *See In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990); *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973). Some states grant the clergy member a privilege independent of the penitent.[2] In these states, the clergy-penitent privilege gives the clergy member a right of silence, separate from the penitent's rights that is not waivable by the penitent. A few states have enacted statutes that do not address who may

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[2] *See* Ala. Code § 12-21-166 (1979); Cal. Evid. Code §§ 1030-34 (Deering 1990); Colo. Rev. Stat. § 13-90-107(1)(c) (1997); Ga. Code Ann. § 24-9-22 (1989); Kan. Stat. Ann. § 60-429 (1988); N.J. Rev. Stat. § 2A:84A-23 (1987); Ohio Rev. Code Ann. § 2317.02(c) (Banks-Baldwin 1990).

invoke or waive the privilege.[3] The majority of states, including New York, have enacted a clergy-penitent privilege, by statute or evidentiary rule, that is only waivable by the penitent.[4]

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3 *See* 735 Ill. Comp. Stat. 5/8-803 (West 1992); Md. Code Ann. (Cts. & Jud. Proc.) § 9-111 (West 1978); Mich. Comp. Laws § 767.5a(2) (1998); Mo. Ann. Stat. § 491.060(4) (West 1996); Vt. Stat. Ann. tit. 12, § 1607 (1947); Va. Code Ann. § 19.2-271.3 (Michie 1950); Wyo. Stat. Ann. §-1-12-101 (Michie 1977).

4 *See* Alaska R. Evid. 506; Ariz. Rev. Stat. § 12-2233 (1994); Ark. Code Ann. § 16-41-101 (Michie 1987 & Supp. 1990); Ark. R. Evid. 510; Conn. Gen. Stat. § 52-146b (1991); Del. R. Evid. 505; D.C. Code Ann. § 14-309; Fla. Stat. Ann. § 90.505 (West 1998); Haw. Rev. R. Evid. 506; Idaho Code § 9-203 (1990); Ind. Code Ann. § 34-1-14-5 (West 1983); Iowa Code Ann. § 622.10 (West 1998); Ky. R. Evid. 505; La. Code Ann. Art. 511 (West 1995); Me. R. Evid. 505; Mass. Gen. Laws Ann. ch. 233, § 20a (West 1986); Minn. Stat. Ann. § 595.02 (West 1988); Miss. Code Ann. § 13-1-22 (1997); Mont. Code Ann. § 26-1-804 (1997); Neb. Rev. Stat. § 27-506 (1943 & Supp. 1975); Nev. Rev. Stat. Ann. § 49.255 (Michie 1979 & Supp. 1989); N.H. Rev. Stat. Ann. § 516:35 (1989); N.M. R. Evid. 11-506; N.Y. C.P.L.R. 4505 (McKinney 1990); N.C. Gen. Stat. § 8-53.2 (1990); N.D. R. Evid. Rule 505; Okla. Stat. Ann. tit. 12 § 2505 (West 1993); Or. Rev. Stat. § 40.260 (1981); Pa. Stat. Ann. tit. 42, § 5943 (West 1982); R.I. Gen. Laws § 9-17-23 (1997); S.C. Code Ann. § 19-11-90 (Law. Co-op. 1976); S.D. Codified Laws Ann. § 19-13-16 to -18 (Michie 1995); Tenn. Code Ann. § 24-1-206 (1990); Tex. R.

B. The New York Clergy-Penitent Privilege is Defined by Statute, Along With Other Similar Privileges.

In article 45 of the C.P.L.R, the New York legislature created a statutory scheme of privileges that arise in certain relationships recognized by the legislature as confidential. N.Y. CPLR art. 45. These provisions codify evidentiary rules that restrict the admissibility of information that is communicated in certain confidential situations. Specifically, CPLR section 4502 creates a privilege for communications between spouses, N.Y. CPLR § 4502, section 4503 codifies the attorney-client privilege, N.Y. CPLR § 4503, section 4504 establishes a physician-patient privilege, N.Y. CPLR § 4504, and section 4505 delineates the clergy-penitent privilege. N.Y. CPLR § 4505. Similarly, CPLR sections 4507, 4508, and 4510(b) confer a privilege on communications with psychologists, social workers, and rape crisis counselors. N.Y. CPLR. §§ 4507-4508, 4510. Under each statutory provision, the party communicating the information possesses the right to waive the privilege.

In New York, the clergy-penitent privilege is codified in CPLR section 4505, which provides that

> Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed (to) disclose a

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Evid. 505; Utah Code Ann. § 78-24-8 (1953); Wash. Rev. Code Ann. § 5.60.060 (West 1988); W. Va. Code § 57-3-9 (1992); Wis. Stat. Ann. § 905.06 (West 1993).

> confession or confidence made to him in his professional character as spiritual advisor.

N.Y. C.P.L.R. 4505. This statutory provision is very specific – a clergy member is absolutely prohibited from disclosing a confidence without permission.

C. New York Recognizes a Private Right of Action Against Individuals Who Violate Other Confidential Relationships, But the New York Court of Appeals Refused to Recognize Such a Claim Arising From the Confidential Relationship Identified in CPLR Section 4505.

Consistent with this statutory scheme of privileges, New York courts have recognized that other confidential relationships identified in Article 45 of the CPLR may give rise to private causes of action, grounded in a breach of fiduciary duty. Specifically, New York has recognized a cause of action by patients against physicians who disclose confidential information. *See Tighe v.* Ginsberg, 146 A.D.2d 268, 270, 540 N.Y.S.2d 99 (4th Dep't 1989). Similarly, a patient may bring a claim against a psychiatrist for breach of fiduciary duty for improper disclosure. *See MacDonald v. Clinger*, 84 A.D.2d 482, 486-489, 446 N.Y.S.2d 801 (4th Dep't 1982). A client may also sue a social worker who discloses confidences. *See Harley v. Druzba*, 169 A.D.2d 1001, 1002, 565 N.Y.S.2d 278 (3d Dep't 1991). Attorneys are also considered to be fiduciaries who may not disclose client confidences. *See Kassis v. Teacher's Ins. & Annuity Ass'n.*, 93 N.Y.2d 611, 616, 695 N.Y.S.2d 515 (1999). In its decision, the New York Court of Appeals refused to recognize that the confidential relationship between a clergy member and a person seeking spiritual guidance was a

fiduciary relationship that could be the basis of a similar cause of action for clergy disclosures of confidences. By making this distinction, the New York Court of Appeals set clergy members apart from other individuals subject to the confidentiality restrictions in Article 45 of the CPLR.

The New York Court of Appeals refused to recognize a cause of action based on CPLR section 4505 that was analogous to causes of action previously recognized in connection with other confidential relationships identified in Article 45 of the CPLR. (App. A13-16.) Both the trial court and the dissenting justices in the Appellate Division focused on the First Amendment issues raised by the parties in concluding that the clergy-penitent relationship identified in CPLR section 4505 did give rise to a cause of action for breach of fiduciary duty. (App. A26, A61.)[5]

In its decision, the New York Court of Appeals claimed that its ruling was not entirely motivated by First Amendment issues. But in addressing those First Amendment issues, the court stated that it believed recognizing a cause of action would have "troubling constitutional implications." (App. A17.) The court noted that the constitution prohibited courts from requiring litigants to prove religious doctrines or beliefs and interfering with religious disputes. (App. A17-18.) Relying on these principles, the New York court concluded that section 4505

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[5] The First Amendment is applicable to the states through the Fourteenth Amendment. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978).

was merely an evidentiary privilege that could not be the basis of a private right of action. (App. A18-19.) In reaching this conclusion, the New York Court of Appeals attempted to distinguish the clergy-penitent privilege from the other privileges in Article 45 by noting that the clergy-penitent privilege was not recognized at common law and members of the clergy were not otherwise subject to state regulation. (App. A12-16.)

In reality, the distinctions identified by the New York Court of Appeals are not legitimate. Article 45 includes other privileges that were not recognized at common law, including the client-social worker privilege and the patient-psychologist privilege, and causes of action based purely on those confidential relationships have been recognized. *See MacDonald v. Clinger*, 84 A.D.2d 482, 486-489, 446 N.Y.S.2d 801 (4th Dep't 1982); *Harley v. Druzba*, 169 A.D.2d 1001, 1002, 565 N.Y.S.2d 278 (3d Dep't 1991). The Court of Appeals also asserted that clergy were different from other classes of professionals who were required to comply with confidentiality provisions because other professionals were subject to state regulation, while clergy could engage in religious activities without state oversight. (App. A12-16.) This distinction, however, merely recognizes that the state may not otherwise regulate a clergy member's performance of religious duties.[6] The New York

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[6] Of course, the state does regulate some activities of clergy members, including when and whether a clergy member may perform marriage ceremonies. *See, e.g.* N.Y. Domestic Relations Law § 11-b (requiring registration of persons, including clergy, performing marriage ceremonies in New York City); N.Y. Domestic Relations Law §§ 17 (clergy members who

court never explains why the absence of a regulatory scheme is a legitimate basis for completely immunizing clergy members from liability while subjecting the other confidential relationships identified in Article 45 to civil liability.

D. By Exempting Clergy Members From Liability for Violations of Their Fiduciary Duty to Maintain Confidentiality, the New York Court of Appeals Impermissibly Placed Religious Leaders in a Preferred Legal Position, a Holding That is In Conflict With This Court's First Amendment Jurisprudence.

The New York Court of Appeals' decision, by completely exempting clergy members from liability for breach of fiduciary duty, clashes with this Court's First Amendment jurisprudence. The Free Exercise Clause, on which the New York Court of Appeals apparently relied, "embraces two concepts, – freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Generally, this Court has held that the First Amendment bars the imposition of liability on members of a religious society for conduct or activities in furtherance of their religious beliefs, and a court must avoid resolving ecclesiastical issues. *See Serbian E. Orthodox Diocese for the United States of Am. and Canada v. Milivojevich*, 426 U.S. 696, 708-10 (1976); *Presbyterian Church v. Mary*

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perform marriage ceremonies between parties without a licence is guilty of misdemeanor).

Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 451-52 (1969). A party may not, however, avoid application of civil or criminal law merely by invoking religious principles as a basis for the party's actions.

A court may apply neutral principles of state tort law to conduct of clergy members. As this Court has stated, "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990). In *Smith*, this Court refused to allow members of a Native American church to raise their religious beliefs as an absolute defense to charges based on violation of state drug laws. *Id.* As a general proposition, members of the clergy are still subject to the strictures of state and federal law, even when claiming that actions are motivated by or required by religious precepts. *See, e.g. United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999) (freedom of speech and of religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes.) This Court has been reluctant to allow the Free Exercise clause to be used as a means of creating "an anomaly in the law, a constitutional right to ignore neutral laws of general applicability." *City of Bourne v. P.F. Flores*, 521 U.S. 507, 513 (1997). The New York Court of Appeals has done precisely that by immunizing members of the clergy from liability for breach of fiduciary duty arising from a disclosure in violation of the clergy-penitent privilege. Because this decision is inconsistent with this Court's First Amendment jurisprudence, the Petition should be granted.

E. Contrary to the New York Court of Appeals' Conclusion, the Free Exercise Clause Does Not

Insulate Clergy Members From Breach of Fiduciary Duty Claims Premised on Violations of the Clergy-Penitent Privilege Because Neutral Principles of Law May be Applied in Adjudicating Such Claims.

The Petition should also be granted to review the New York Court of Appeals' determination that recognizing a claim for breach of fiduciary duty would infringe on a clergy member's First Amendment rights. Because the clergy-penitent privilege constitutes a neutral principle of law, there is no basis in the First Amendment for refusing to recognize a cause of action for breach of fiduciary duty arising out of the clergy-penitent privilege. New York courts have recognized that, under this Court's First Amendment jurisprudence, disputes involving religious entities and officials may be adjudicated when no inquiry into church doctrine is required. *See First Presbyt. Church of Schenectady v. United Presbyt. Church in United States of Am.*, 62 N.Y.2d 110, 119, 476 N.Y.S.2d 86 (1984). Here, the question of whether Flaum and Weinberger violated the fiduciary duty recognized by CPLR section 4505 may be adjudicated using neutral principles of law under the specific standard of confidentiality identified in the statute.

By enacting section 4505, the New York legislature recognized that a confidential relationship exists between a clergy member and a person seeking spiritual guidance and imposes a duty on the clergy member to maintain the confidentiality of any information imparted by the penitent. N.Y. CPLR § 4505. Section 4505 also defines a specific situation when that confidential relationship is breached – a clergy member's unauthorized disclosure of confidences. *Id.* As the trial court in this case noted, "the privilege belongs to

the penitent, not the clergy, and must be honored." (App. A85.) In determining whether there has been a breach of fiduciary duty, there is no need to resort to religious doctrine to determine liability.

This case is also easily distinguishable from claims grounded in the concept of clergy malpractice. Courts have uniformly rejected claims for "clergy malpractice" because such a claim requires definition of the relevant standard of care, a standard necessarily bound up in religious issues. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 337 (5th Cir. 1998). But where a standard, such as whether a fiduciary duty was breached, is not the product of religious doctrine, there are no such concerns. *Id.* In *Sanders*, the court found that the common law standards for fiduciary duty were an adequate basis for imposing liability on a clergy member under Texas law. *Id.* Where standards exist outside of religious doctrine, a claim may be recognized.

As the Colorado Supreme Court explained, a claim for breach of fiduciary duty involves breach of trust and does not require a professional relationship or a professional standard of care, while [a claim for clergy malpractice] is an action for negligence based on a professional relationship and a professional standard of care." *Moses v. Diocese of Colorado*, 863 P.2d 310 n.13 (Colo. 1993). CPLR section 4505 identifies when the confidential relationship has been breached, and a court may "measure a religious organization's or official's conduct by pre-existing secular standards of care to which all fiduciaries are held." *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 10 F. Supp. 2d 138, 146 (D. Conn. 1998), *aff'd in part and reversed in part on other grounds*, 196 F.3d 409 (2d Cir. 1999). The relationship between Chani Lightman and the rabbis is identified and

defined by CPLR section 4505 and the standard to be applied is found in the statute, not in any religious doctrine. Because, in reaching a different conclusion, the New York Court of Appeals altered this Court's First Amendment jurisprudence, the Petition should be granted.

F. The New York Court of Appeals' Decision Conflicts With Other State and Federal Decisions Recognizing That Breach-of-Fiduciary Claims are not Barred Under This Court's First Amendment Jurisprudence.

By refusing to recognize a cause of action for breach of fiduciary duty in this case, the New York Court of Appeals created a conflict with other courts that have concluded the First Amendment does not bar such causes of action against clergy members. The Ohio Court of Appeals dealt with a strikingly similar situation in *Alexander v. Culp*, 705 N.E.2d 378 (Ohio App. 1997). In that case, the plaintiff met with a minister for marital counseling and disclosed confidential information, including that he was having an affair and intended to leave his wife and take their children to another state. *Alexander*, 705 N.E.2d at 379-80. The minister then disclosed this information to the plaintiff's wife. *Id.* While rejecting a claim based on Ohio's statutory clergy-penitent privilege, because that statute had no application to disclosures outside the courtroom, the Ohio Court of Appeals held that the allegations stated a viable claim for common law negligence. Noting that "public policy supports an action for breach of confidentiality by a minister," the court rejected the argument that First Amendment issues barred such a cause of action. The court also distinguished the claim for disclosure of confidences from a claim for clergy

malpractice, stating that "although the duty not to disclose arose from the clergy/parishioner relationship, the breach of the duty to preserve [the plaintiff's] confidences neither involved nor compromised any religious tenets." *Alexander*, 705 N.E.2d at 382. Unlike the New York court in this case, the Ohio court in *Alexander* refused to grant immunity to clergy members for improper disclosure of confidences.

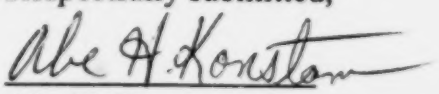
Other courts have also concluded that even if a clergy member's conduct is allegedly based on his or her religious beliefs, the clergy member may still be held liable notwithstanding the claim that the clergy member's actions were driven by religious beliefs, as Flaum and Weinberger asserted in this case. In *F.G. v. MacDonell*, 696 A.2d 697 (N.J. 1997), the New Jersey court recognized that the First Amendment does not insulate a member of the clergy from actions for breach of fiduciary duty arising out of sexual misconduct that occurs during counseling sessions. *MacDonell*, 696 A.2d at 702. Similarly, in *Sanders*, the Fifth Circuit held that the First Amendment's prohibition against judicial review of ecclesiastical disputes did not bar a parishioners claims that a minister breached a fiduciary duty in violation of Texas law by maintaining sexual relationships with them while providing them with marriage counseling where the minister held himself out as professional marriage counselor. *Sanders*, 134 F.3d at 337. The Oregon Court of Appeals also has recognized a cause of action based on breach of a confidential relationship against pastor who allegedly sexually abused a plaintiff within a counseling relationship. *See Erickson v. Christenson*, 781 P.2d 383, 386 (Ore. App. 1989). The Colorado Supreme Court, using neutral principles of law, upheld findings of liability against a diocese and a bishop for breach of fiduciary duty based on sexual relationship between assistant priest and parishioner in

counseling setting. *Moses,* 863 P.2d at 321 n.13. These courts have recognized, consistent with this Court's jurisprudence, that a claim for breach of fiduciary duty may be made against a clergy member without running afoul of the First Amendment.

CONCLUSION

The issues presented in this Petition are important questions of law involving this Court's First Amendment jurisprudence, and the Petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,



Abe H. Konstam, Esq.
Counsel of Record
Mallow, Konstam & Hager, P.C.
321 Broadway
New York, New York 10007
(212) 964-7990

Counsel for Petitioner

Court of Appeals
State of New York

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2 No. 144
Chani Lightman,
Appellant,
v. OPINION

Tzvi Flaum, RC., et al.,
Respondent.

Abe H. Konstam, for appellant,
Franklyn H. Snitow, for respondents.
National Jewish Commission on Law and Public Affairs, et al, amici curiae.

GRAFFEO, J.:

In this appeal, we must decide whether CPLR 4505 imposes a fiduciary duty of confidentiality upon members of the clergy that subjects them to civil liability for the disclosure of confidential communications. We hold that it does not.

After 15 years of marriage, plaintiff Chani Lightman initiated a divorce proceeding against her husband, Hylton

Lightman, in February 1996. She also sought an order granting her temporary custody of the parties' four children. In opposition to plaintiff's application, her husband submitted, under seal, affirmations from two rabbis, apparently intending to show that his wife was jeopardizing the Orthodox Jewish upbringing of the children by not following religious law. Rabbi Tzvi Flaum, who was associated with the synagogue where the Lightmans were congregants, stated that plaintiff had advised him that she had stopped engaging in "religious purification laws" and was "seeing a man in a social setting." Similarly, Rabbi David Weinberger, an acquaintance of the Lightmans, in his affirmation indicated that plaintiff had acknowledged to him that "she freely stopped her religious bathing so [that] she did not have to engage in any sexual relations" with her husband, and he opined that plaintiff no longer wanted "to adhere to

Jewish law despite the fact that she is an Orthodox Jew and her children are being raised Orthodox as well."

As a result of the rabbis' disclosures of those conversations, plaintiff commenced this action against them, asserting causes of action for breach of fiduciary duty in violation of the CPLR 4505 "clergy-penitent privilege," intentional infliction of emotional distress and defamation against Rabbi Weinberger. Prior to answering, defendants moved to dismiss the complaint, contending that a violation of the statutory evidentiary privilege did not give rise to a private right of action, plaintiff's allegations were insufficient to support a cause of action for intentional infliction of emotional distress and the statements of Rabbi Weinberger were protected speech in the nature of an opinion. Plaintiff opposed the motion and defendants countered that dismissal of the breach of fiduciary duty claims was compelled by the

First Amendment of the United States Constitution because the disclosures were required under Jewish Law.

Supreme Court converted the motion into one for summary judgment and directed the parties to provide further evidence relevant to that determination. Rabbi Flaum submitted two additional affirmations in which he expanded on the nature of his discussions with the Lightmans. He claimed that more than two years earlier Hylton Lightman first revealed marital problems to him. That conversation prompted plaintiff's mother to request that he speak with plaintiff. At the meeting, plaintiff and her mother berated him for discussing the marriage with plaintiff's husband and for giving advice without obtaining plaintiff's version of the situation. He alleged that plaintiff admitted to discontinuing her religious purification rituals and indicated she was socializing with men other than her husband. Rabbi Flaum further contended that these statements were not confidential

because plaintiff never requested spiritual religious guidance and that, pursuant to Jewish law, he was obliged to relay this information to plaintiff's husband in order to prevent him from engaging in conjugal relations with his wife in violation of the Torah, as well as to shield the couple's children from exposure to plaintiff's improper conduct.

Rabbi Weinberger echoed this doctrinal explanation for the disclosures and alleged that he had met jointly, and separately, with the Lightmans. He claimed plaintiff was accompanied by a friend at these meetings on more than one occasion. Expressing surprise that plaintiff would have admitted her failure to follow religious laws of family purity while in the presence of a friend, Weinberger indicated that these revelations led him to believe the discussions were not confidential. Plaintiff dispatched defendants' interpretation of religious law, and characterized here interactions with defendants as spiritual counseling received with the

expectation that intimate information would remain confidential.

Supreme Court granted partial summary judgment by dismissing plaintiff's defamation claim but ruled that the causes of action for intentional infliction of emotional distress and breach of fiduciary duty were viable. As to the latter, the court concluded that there were issues of fact regarding whether the communications remained confidential despite the presence of third parties during the various conversations and whether the communications were made to defendants in their spiritual capacity. Supreme Court further found that a violation of CLPR 4505 was actionable as a breach of fiduciary duty of confidentiality and that there were no First Amendment implications under the facts presented.

The Appellate Division modified by dismissing the fiduciary duty and emotional distress causes of action. The court determined that plaintiff failed to demonstrate that she

had not waived the clergy-penitent privilege due to the presence of third parties during her meetings with each of the defendants. Accordingly, the court declined to address whether plaintiff stated a claim for breach of fiduciary duty.

Two Justices dissented, in part, and would have sustained the causes of action for breach of fiduciary duty, leaving as an issue of fact whether plaintiff waived the clergy-penitent privilege. Finding the fiduciary duty claims actionable, the dissent reasoned that a cause of action for breach of fiduciary duty of confidentiality stems from a breach of CLPR 4505 because claims arising from violations of analogous statutory provisions had been recognized and defendants had not adequately shown they were entitled to First Amendment protection. Plaintiff appealed to this Court as a matter of right, and we now affirm for reasons different from those stated by the Appellate Division.

The common law insulated certain confidential information from disclosure at trial, such as interspousal communications made during the course of a marriage. (*see*, *McCormick on Evidence* § 78, at 323-24 [5th ed. 1999]). Eventually, special categories of confidential communications were deemed by statute to be entitled to a privilege against disclosure (*see,* Prince, *Richardson on Evidence* § 5-101, at 225 [Farrell 11th ed. 1995]). CPLR article 45 codifies rules of evidence that restrict the admissibility of information obtained in specific confidential contexts, such as that which exists between spouses (CPLR 4502), attorney and client (CPLR 4503), physician and patient (CPLR 4504), psychologist and client (CPLR 4507) and social worker and client (CPLR 4508). In general, these statutes protect special relationships akin to fiduciary bonds, which operate and flourish "in an atmosphere of transcendent

trust and confidence." (*Aufrichtig v. Lowell*, 85 N.Y.2d 540, 546).

The clergy-penitent privilege was unknown at common law (*see, Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 166, *cert. denied* 444 U.S. 897).[7] It arose from the Roman Catholic sacrament of Penance, which requires sins to be disclosed to a priest who is prohibited by ecclesiastical law from revealing the substance of those disclosures even when the refusal to disclose results in imprisonment for contempt, (see, Alexander, Practice Commentaries, McKinney's Cons

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[7]The privilege has been alternatively referred to as the "priest-penitent" privilege (*Matter of Keenan v. Gigante, supra*, at 166), "clergy-penitent" privilege (Alexander, 1994 Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505, 2001 Supp. Pamph., at 137), "minister-penitent" privilege (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4505, at 683), "cleric-congregant" privilege (*People v. Carmona*, 81 NY2d 603, 609) and "clergy-communicant" privilege (Morville & Anello, "The Clergy Communicant Privilege", NYLJ, Oct. 2, 2001, at 3, col. 3).

Laws of NY, Book 7B, CPLR 4505, at 683). Enacted to respond "to the urgent needs of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized" (*Matter of Keenan v. Gigante*, 47 N.Y.2d at 166), the privilege originally applied only to communications with members of the clergy who were enjoined from disclosing the substance of such communications under the rules or practices of their religion (*see*, former Civil Practice Act § 351).

Recognizing the value of extending the privilege to other religions (*see*, Second Prelim Report of Advisory Comm on Prac & Pro, 1958 NY Legis Doc. No. 13, at 93), the Legislature adopted CPLR 4505, which applies to confidential communications made by congregants to clerics of all religions (*see, People v. Carmona*, 82 N.Y.2d at 608-609). CPLR 4505 provides that unless "the person

confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed [to] disclose a confession or confidence made to him in his professional character as spiritual advisor." A communication is not privileged merely because it is made to a cleric (*see, Matter of Keenan v. Gigante*, 47 N.Y.2d at 166). Rather, the statute's protection envelops only information imparted "in confidence and for the purpose of obtaining spiritual guidance" (*People v. Carmona*, 82 N.Y.2d at 609).

Here, plaintiff acknowledges that she cannot prevail without proving the existence of a fiduciary relationship with each defendant and the requisite expectation of confidentiality, but argues that she automatically satisfies both elements because the information protected by CPLR 4505 is confidential as a matter of law. Defendants, on the other hand, reject the notion that a rule of evidence can

establish an actionable fiduciary duty of confidentiality. They contend that clerics cannot be compared to the secular professionals enumerated in article 45 because those practitioners derive their professional authority from the issuance of licenses. Defendants emphasize that these professionals must conduct themselves in accordance with the rules that regulate their interactions with clients or patients and are subject to the disciplinary measures for professional misconduct. Finally, defendants claim that utilizing CPLR 4505 as the fiduciary standard would raise significant constitutional concerns because it would require courts to interpret religious principles and chill defendants' exercise of Jewish beliefs.

We find a distinction between confidential information under the rules and regulations that govern secular professionals and information cloaked by an evidentiary privilege under the CPLR. This difference demonstrates that

statutory privileges are not themselves the sources of fiduciary duties but are merely reflections of the public policy of this State to proscribe the introduction into evidence of certain confidential information absent the permission of or waiver by a declarant. For example, in the attorney-client context, CPLR 4503 applies only to "confidential communication[s] made between the attorney or his employee and the client." The Code of Professional Responsibility, however, prohibits the disclosure not only of "confidences," defined as "information protected by the attorney-client privilege," but also of "secrets," described as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client" (Code of Professional Responsibility DR 4-101 [A], [B] [22 NYCRR 1200.19 (A),

(B)]). Thus, an attorney's duty of confidentiality is substantially broader than that reflected in CPLR 4503.

In fact, we have previously explained that a significant purpose of the Code of Professional Responsibility is to ensure "that attorneys remain faithful to the fiduciary duties of loyalty and confidentiality owed by attorneys to their clients" (*Karsis v. Teacher's Ins. & Annuity Assn.*, 93 N.Y.2d 611, 616) as well as the "duty to deal fairly, honestly and with undivided loyalty" (*Matter of Cooperman*, 83 N.Y.2d, 465, 472, *see also, Matter of Russakoff*, 79 N.Y.2d 520, 524 and *Greene v. Greene*, 47 N.Y.2d 447, 451).

A similar dichotomy between professional confidentiality obligations and evidentiary rules designed to preserve confidentiality exists for physicians and other health care professionals. CPLR 4504 prevents the disclosure of information "acquired in attending a patient in a professional capacity, and which was necessary to enable [the physician or

other health care professional] to act in that capacity." Nevertheless, information obtained in a professional capacity but not necessary to enable the physician to fulfill his or her medical role is a protected confidence, the disclosure of which constitutes professional misconduct in the absence of patient consent or legal authorization (*see*, Education Law § 6530 [23]; *see also*, 8 NYCRR 29.1 [b] [8]). Thus, although the statutory privileges may in some instances overlap with the applicable fiduciary duties of confidentiality which have been defined elsewhere in the law, those evidentiary rules are not the sources of the underlying duties, and article 45 does not establish the parameters of those fiduciary relationships.

The clergy and the other classes of professionals specified in CPLR article 45 are also fundamentally different with respect to the extent of State regulation of their professional practices. Individuals employed in other fields subject to

statutory privileges derive their authority to practice from the State, which conditions the issuance of a license on, among other requirements, the completion of formalized education and/or training (*see*, Education Law §§ 6524 [2], 6554 [2], 6604 [2], 6905 [2], 7004 [2], 7603 [2], 7704 [2], 22 NYCRR 520.3, 520.4.) Statutes and regulations specifically prohibit the disclosure of confidences and invoke the possibility of sanctions for professional misconduct (*see, e.g.*, Education Law § 6530 [23], *supra*, 8 NYCRR 29.1 [b] [8], *supra*; Code of Professional Responsibility DR 1-102 [A] [1] [22 NYCRR 1200.3 (A) (1)]; Code of Professional Responsibility DR 4-101 [A], [B] [22 NYCRR 1200.19 (A), (B)]). In contrast, clerics are free to engage in religious activities without the State's permission, they are not subject to State-dictated educational prerequisites and, significantly, no comprehensive statutory scheme regulates the clergy-congregant spiritual counseling relationship. This explains

plaintiff's inability to identify a source of defendants' alleged duty of confidentiality independent of CPLR 4505.

Defendants and the *amici* strenuously argue that the imposition of liability without regard to a cleric's religious principles which motivate or compel disclosure would violate the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Despite the inconsistencies in defendants' rationale for revealing plaintiff's communications (as aptly noted by the dissent in the Appellate Division), the prospect of conducting a trial to determine whether a cleric's disclosure is in accord with religious tenants has troubling constitutional implications. To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place fact-finders in the inappropriate role of deciding whether religious law has been violated.

The United States Constitution protects the right of individuals to "believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs * * * [I]f those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain" (*United States v. Ballard*, 322 U.S. 78, 86-87). As we explained in a different context, "civil courts are forbidden from interfering in or determining religious disputes. Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct * * * while interfering with the free exercise of the opposing faction's beliefs" (*First Presbyt. Church of Schenectady v. United Presbyt. Church in the United States of Am.*, 62 N.Y.2d 110, 116, *cert denied* 469 U.S. 1037, *see also, Park Slope Jewish Ctr. v. Congregation B'Nai Jacob*, 90 N.Y.2d

517, 521; *Avitzur v. Avitzur*, 58 N.Y.2d 108, 114, *cert denied* 464 U.S. 817).

Guided by these well-settled principles and in the absence of a statute, regulation or other source delineating the scope and nature of the alleged fiduciary duty, we view the CPLR 4505 privilege in the manner intended by the Legislature – as a rule of evidence and not as the basis of a private cause of action. Although plaintiff understandably resents the disclosure of intimate information she claims she revealed to defendants in their role as spiritual counselors, we hold that, as a matter of law CPLR 4505 – directed at the admissibility of evidence – does not give rise to a cause of action for fiduciary duty involving the disclosure of oral communications between a congregant and a cleric. Remittal for factual determinations is thus unnecessary and defendants are entitled to summary judgment dismissing the first and second causes of action.

In light of this conclusion, we need not address plaintiff's remaining contentions, including whether there was an issue of fact concerning her purported waiver of the privilege.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* *

Order affirmed, with costs. Opinion by Judge Graffeo. Chief Judge Kaye and Judges Smith, Levine, Ciparick, Wesley and Rosenblatt concur.
Decided November 27, 2001

Supreme Court of the State of New York
Appellate Division: Second Department

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Carol Lightman,
Respondent,

v. Dec. 18, 2000

Tzvi Flaum, etc, et al.,
Appellant.

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Congregant brought action against two rabbis alleging breach of duty of confidentiality, intentional infliction of emotional distress, and defamation after rabbis disclosed confidential communications to congregant's husband and in divorce proceeding. The Supreme Court, Queens County, David Goldstein, J., denied rabbis' motion for summary , and the appealed. The Supreme Court, Appellate Division, held that: (1) congregant waived clergy-penitent privilege during her conversations with the rabbis, barring her claim of breach of the fiduciary duty of confidentiality, and (2) rabbis' conduct was sufficiently outrageous to support claim for intentional infliction of emotional distress.

Reversed.

Miller, J., filed opinion concurring in part and dissenting in part.

MEMORANDUM BY THE COURT

In an action, inter alia, to recover damages for breach of the fiduciary duty of confidentiality and the intentional infliction of emotional distress, the defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Goldstein, J.), dated March 4, 1999, as, upon converting their motion to dismiss the complaint pursuant to CPLR 3211(a)(7) to a motion for summary judgment, in effect, denied those branches of the motion which were for summary judgment dismissing the first, second, third and fourth causes of action.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the motion which were for summary judgment dismissing the first,

second, third and fourth causes of action are granted, and the complaint is dismissed.

The plaintiff, an Orthodox Jewish woman, was experiencing marital difficulties and turned to the defendant rabbis. During her talks with the defendants, she disclosed certain private information to them. However, either the plaintiff's mother or a friend were present during those conversations. The plaintiff subsequently commenced a divorce action against here husband. In opposition to the plaintiff's motion for *pendente lite* relief, her husband submitted affirmations by the defendants which contained come of the material she had disclosed to them. As a result of the disclosure, the plaintiff commenced this action against the defendants, asserting causes of action for, *inter alia*, breach of the fiduciary duty of confidentiality and the intentional infliction of emotion distress. Upon converting the defendants' motion to dismiss pursuant to CPLR

3211(a)(7) to one for summary judgment, the Supreme Court, in effect, denied the defendants summary judgment on the causes of action for breach of fiduciary duty, subject to a determination, *inter alia*, of whether the plaintiff's privilege had been waived by the presence of a third person. The Supreme Court also found that the defendants were not entitled to summary judgment on the third and fourth causes of action for intentional infliction of emotional distress. We reverse.

After the defendants made a prima facie showing that they were entitled to summary judgment as a matter of law, the plaintiff failed to demonstrate the existence of a triable issue of fact. Specifically, the plaintiff failed to show that the clergy-penitent privilege was not waived by the presence of a third person during her conversations with each of the defendants (*see, Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). In view of

this determination, we do not determine whether the plaintiff stated a cognizable claim for breach of fiduciary duty.

Likewise, the defendants are entitled to summary judgment dismissing the third and fourth causes of action alleging intentional infliction of emotional distress. The facts alleged regarding the defendants' conduct did not rise to a level which would satisfy the "extreme and outrageous conduct" element of such a cause of action and, therefore, summary judgment was warranted (*Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 490 N.Y.S.2d 785, 480 N.E.2d 349). SANTUCCI, J.P., FLORIO and MCGINITY, J., concur.

S. MILLER, J., concurs in part and dissents in part and votes to modify the order appealed from by deleting the provision thereof denying that branch of defendants' motion which was, in effect, for summary judgment dismissing the third and fourth causes of action to recover damages for the

intentional infliction of emotional distress and substituting therefor a provision granting that branch of the motion, and otherwise affirming the order, with the following memorandum, in which FRIEDMANN, J., concurs:

I agree with my colleagues in the majority that the Supreme Court erred insofar as it failed to dismiss the plaintiff's causes of action to recover damages for intentional infliction of emotional distress. However, I must strenuously disagree insofar as my colleagues have determined, as a matter of law, that the plaintiff waived her right to seek redress for the defendants' obvious and intentional violations of their legal duty not to disclose confidences she imparted to them while seeking religious counseling. Insofar as pertinent to this appeal, CPLR 4505 provides a secular command line that "thou shalt not tell". The defendants twice violated that command. Furthermore, as the Supreme Court found, the plaintiff has a private right of action for the fiduciary breach

flowing from this statutory violation. Finally, the defendants have not demonstrated to my satisfaction that the First Amendment precludes the imposition of liability where, as here, they engaged in intentional acts in clear violation of a valid and neutral enactment that was not intended to regulate religious conduct and which were, in any event, gratuitous under the facts of this case. Accordingly, I would sustain the first and second causes of action seeking to recover damages for the defendants' statutory/fiduciary violations subject to factual determinations to be made at trial as to whether the plaintiff waived the privilege.

I

The facts underlying the appeal, with one critical exception to be discussed, infra, are not in substantial dispute. The plaintiff Chani Lightman and her husband, Dr. Hylton Ivan Lightman, both Orthodox Jews, were experiencing marital difficulties that prompted the plaintiff to

see her rabbis, the defendants, Tzvi Flaum and David Weinberger. In 1995, in the course of their discussions, the plaintiff revealed various personal matters concerning here dissatisfaction with the state of her marriage and that she was deviating from some of the strictures of her religion. Subsequent thereto, the defendant rabbis revealed these confidences to Dr. Lightman. Moreover, in the matrimonial action commenced by the plaintiff in 1996, the defendant rabbis gratuitously repeated their disclosures by way of affirmations submitted in opposition to the plaintiff's then-pending *pendente lite* application.

The plaintiff commenced this action in 1997 asserting five causes of action. Insofar as pertinent, the plaintiff's first two causes of action sought to recover damages for each of the defendant rabbis' intentional violations of the "penitent-clergy privilege" (*see*, CPLR 4505).

II

To correctly decide the substantive issues presented on this appeal, it is necessary to understand the unusual procedural path this case followed. The defendants answered the complaint with a motion to dismiss pursuant to CPLR 3211(a)(7). Insofar as relevant to the first two causes of action, the defendants argued that the plaintiff had no private right of action for the alleged violation of CPLR 4505 which they regarded as a mere rule of evidence. The plaintiff opposed this motion, characterizing her first two causes of action as alleging an actionable "breach of fiduciary duty arising from the breach of the clergy-penitent privilege". In the alternative, the plaintiff pointed to the numerous cases recognizing the existence of private rights of action against health care and other professionals for violating analogous confidentiality statutes, and argued that her claims against the rabbis were similarly cognizable.

By order dated November 7, 1997, the Supreme Court notified the parties that is was converting the defendants' motion to dismiss into one for summary judgment pursuant to CPLR 3211(c). The Supreme Court directed the parties to submit affidavits or other probative evidence within 30 days, or pursuant to a schedule to be set by the parties. The parties opted to submit their affirmations according to an agreed-upon schedule. The defendant rabbis each submitted affirmations on or about December 22, 1997. Among other things, the rabbis claimed, for the very first time, that they were obligated under Jewish law to reveal to Dr. Lightman the plaintiff's confessed failure to engage in monthly purification rituals. The rabbis asserted that they were required to warn Dr. Lightman thereof to ensure his compliance with religious strictures. They also claimed that their disclosure via the affirmations they submitted in the divorce action were necessary to protect the religious

upbringing of the Lightman children. They further denied having disclosed the confidences to anyone else.

When the plaintiff attempted to serve her affirmation dated December 29, 1997, the defense counsel rejected it as untimely. As his letter dated January 5, 1998, explained, the parties understood that upon the conversion of the motion from one to dismiss to one for summary judgment, "there was to be a simultaneous exchange of affidavits with no right of reply", and "the motion for summary judgment was fully submitted for decision on December 22, 1997."

The parties subsequently agreed to extend the date for full submission papers beyond December 22, 1997. The plaintiff submitted an affirmation dated February 3, 1998, in addition to that dated December 29, 1997, and the defendant rabbis each submitted additional affirmations dated February 5, 1998. The plaintiff's affirmation of December 29, 1997, disputed the defendants' claims that they were obligated,

under Jewish law, to make the disclosures to Dr. Lightman or the divorce court. Her affirmation dated February 3, 1998, disputed the rabbis' claims that they had not revealed her confidences except to Dr. Lightman and in the matrimonial action, and she named other individuals with whom she alleged the defendants had shared her confidences.

The defendants' affirmations dated February 5, 1998, were the final papers submitted on the motion. Therein, the defendants each claimed, Rabbi Weinberger for the very first time, that a third person had accompanied the plaintiff when she imparted her confidences. The defendant Flaum asserted that the plaintiff had been accompanied by her mother when she spoke to him, while the defendant Weinberger averred that a friend had accompanied the plaintiff "on more than one occasion" when she spoke to him. Thereafter, the case apparently was dormant for several months due to the plaintiff's substitution of counsel.

The Supreme Court issued an order dated November 18, 1998, in which it held that the disclosures by the defendants were actionable. The court granted partial summary judgment to the plaintiff on the issue of liability as against the defendant Weinberger for the breach of fiduciary duty of confidentiality, but denied partial summary judgment on this issue as against the defendant Flaum, holding a disposition as to him in abeyance pending an immediate trial on the factual issue of whether a third party was present at the time of the alleged confidential communication to that defendant.

However, as the Supreme Court would later reveal, it had not considered the plaintiff's affirmations of December 29, 1997, and February 3, 1998, nor had it considered the rabbis' affirmations of February 5, 1998, in rendering its decision and order of November 18, 1998. Accordingly, to resolve the confusion concerning the state of the record, the parties subsequently entered into a stipulation on January 12, 1999,

pursuant to which, *inter alia*, the November 18, 1998, decision and order was recalled, and the parties and the Supreme Court agreed that a new order would be issued upon its consideration of all of the affirmations submitted.

Consistent with the above, on or about March 4, 1999, the Supreme Court issued an order formally recalling and vacating the November 18, 1998, order. On that same date, the Supreme Court issued the order now on appeal, which, *inter alia*, stated: "Accordingly, upon the foregoing, the motion to dismiss or for summary judgment as to the first and second causes of action for breach of the fiduciary duty of confidentiality is granted in terms of liability only to the extent of limiting, clarifying and defining the factual issues for trial , namely, whether the privilege had been waived by the presence of a third person, and whether the nature of the meeting was such that the communications and disclosures were made to the Rabbis in their spiritual capacity or to

obtain spiritual guidance, and is otherwise denied" (*Lightman v. Flaum*, 179 Misc.2d 1007, at 1018, 487 N.Y.S.2d 562).

While the Supreme Court's precise holding is less than crystal clear from the foregoing, it is apparent that it intended to sustain the plaintiff's first two causes of action alleging breaches of the defendants' respective fiduciary duties of confidentiality, subject to the defendants sustaining their burden of proving their defenses. Thus, in effect, the Supreme Court denied that branch of the defendants' motion which was for summary judgment dismissing the first and second causes of action inasmuch as it referred several factual issues for an immediate trial that still has not taken place. In any event, the Supreme Court found that the defendants' respective violations of the clergy-penitent privilege provided by CPLR 4505 afforded the plaintiff cognizable causes of action for breach of the fiduciary duty of confidentiality and that, since no First Amendment violation

resulted from the enforcement of the clergy-penitent privilege, the rabbis would not be shielded from liability in tort.

III

In my view, the majority has deprived the plaintiff of her entitlement to a determination of the substantial issues vigorously contested both before the Supreme Court and on appeal. The majority's reasoning that the plaintiff failed to demonstrate a triable issue of fact with respect to whether she waived her clergy-penitent privilege is simply not supportable for several reasons.

First, and perhaps most significantly, the majority's conclusion that the plaintiff waived her clergy-penitent privilege *by failing to controvert the defendants' claims regarding the presence of third parties*, is based upon a theory that was never advanced at any stage of the litigation by any of the parties. It is entirely unpreserved. It was not

advanced by the defendants before Justice Goldstein in the Supreme Court, nor raised in their appellate briefs, nor mentioned in oral argument. Indeed, in contrast to the majority's finding that no issues of fact survived the parties' affirmations, the defendants' counsel expressly acknowledged to Justice Goldstein during the parties' on-the-record stipulation discussions that "your decision is going to be, in essence, a denial of our motion to dismiss, and whatever happens with regard to summary judgment, you will treat that *there is going to be fact issue*". Clearly, the majority's conclusion that the plaintiff failed to demonstrate the existence of issues of fact to withstand the defendants' summary judgment motion is based upon a theory completely unanticipated by the parties. Nor is there any rationale to justify the majority reaching this in its interest of justice jurisdiction. On the contrary, justice requires that the plaintiff be afforded her day in court.

Second, the majority's reasoning is flawed in that it fails to recognize that under the unusual procedural circumstances of this case, where there was to be a simultaneous exchange of affirmations. The plaintiff was precluded from responding to the defendants' last submissions. As noted, the allegations of the defendants identifying the third parties allegedly present were advanced by the rabbis in the very last papers submitted on the motion. As per the stipulation of the parties, there was to be "no right of reply". Against this procedural backdrop, it is blatantly improper for this court to find that the defendants are entitled to summary judgment. It is simply not permissible for the defendants "to shift to [the] plaintiff * * * the burden to demonstrate a material issue of fact at a time when [the] plaintiff has neither the obligation nor opportunity to respond absent express leave of court" (*Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 625, 630 N.Y.S.2d 1003). Thus, for this reason as well,

it is improper to award summary judgment to the defendants on the issue of waiver.

Third, the majority ignores the assertion in the plaintiff's December 29, 1997, affirmation that she "saw Rabbi Flaum privately", and the assertions in her December 19, 1997, affirmation that she expected her communications with both rabbis to remain confidential.

Fourth, the defendants failed to establish that third parties were present at *all* pertinent times that disclosures were made. Rabbi Weinberger conclusorily asserted that "[o]n more than one occasion, Mrs. Lightman appeared for her meeting with her friend * * * who was a member of my congregation". Notably, Rabbi Weinberger did not allege that the friend was present on *every* occasion that the plaintiff spoke with him, nor did he allege that all confidential disclosures were made in the presence of the friend. Because this was a non-issue to the parties, and because of the

simultaneous exchange of affidavits, the plaintiff had no opportunity to provide more specific details. Nevertheless, the majority has explicitly concluded that the plaintiff's friend was present at all pertinent times when confidential matters were discussed and that such third-party presence, as a matter of law, resulted in a waiver of the privilege. Clearly no such conclusion is borne out by the record. At a minimum, these conflicting factual assertions clearly give rise to the existence of issues of fact precluding any award of summary judgment (*see, Walker v. Mount Vernon Hosp.*, 272 A.D.2d 468, 708 N.Y.S.2d 322; *Gleeson-Casey v. Otis El. Co.*, 268 A.D.2d 406, 702 N.Y.S.2d 321; *Boyd v. Trent*, 262 A.D.2d 260, 690 N.Y.S.2d 732; *Sobol Inc. v. Goldman*, 259 A.D.2d 526, 686 N.Y.S.2d 477; *Sayers v. Albicocco*, 256 A.D.2d 323, 683 N.Y.S.2d 98).

Fifth, and of critical importance, even assuming that the plaintiff did bring her mother or her friend to all of the

meetings with the defendants and that these third parties were present when the relevant confidences were revealed, it *still* would not be dispositive on the issue of waiver. Although the general rule is that the presence of a third party when an otherwise confidential communication is made results in a waiver of the privilege, exceptions exist; if the communication was intended to be confidential, the fact that a third person was present does not necessarily destroy the privilege.

Generally, the Court of Appeals has recognized:

> "That true test [of determining whether a waiver has occurred] appears to be whether in light of all the surrounding circumstances, and particularly the occasion for the presence of the third person, the communication was intended to be confidential and complied with the other provisions of the statute".

(*People v. Decina*, 2 N.Y.2d 133, 145, 157 N.Y.S.2d 558, 138 N.E.2d 799; *see also, People v. Osorio*, 75 N.Y.2d 80, 550 N.Y.S.2d 612, 549 N.E.2d 1183). The Appellate

Division First Department, had an opportunity to apply this rule in a case that is materially analogous to the instant case.

In *Stroh v. General Motors Corp.*, 213 A.D.2d 267, 623 N.Y.S.2d 873, a Mrs. Maycheck lost control of her car in Washington Square Park and injured numerous pedestrians. She was sued by at least 12 parties, along with General Motors, the manufacturer of the car. The attorneys for General Motors sought to elicit details about Mrs. Maycheck's discussions with her attorneys, arguing that the presence of Mrs. Maycheck's daughter during the attorney-client discussions resulted in a waiver of the privilege that would otherwise attach to these communications. The Appellate Division, First Department rejected this waiver argument, acknowledging that 76-year-old driver was entitled to the moral support of her daughter, concerning this most traumatic event, without having waived the privilege. The court analogized this situation to the many cases holding that

the presence of a party's agent during attorney-client discussions will generally not be held to have destroyed the privilege. The court noted:

> "Generally, the circumstances of each case will determine whether a communication by a client to an attorney should afforded the cloak of privilege (*Matter of Jacqueline F.*, 47 N.Y.2d 215, 222, 417 N.Y.S.2d 884, 391 N.E.2d 967) (*Stroh v. General Motors Corp., supra*, at 268, 623 N.Y.S.2d 873).

In the instant case, the plaintiff was involved in a contentious and emotionally draining marital break-up. She allegedly sought counseling from her rabbis. Even assuming that the defendants conclusively established that the plaintiff was accompanied by her mother or her friend on some of these occasions, as in *Stroh*, certainly her choice to have a close relative or friend to accompany her for emotional support in this time of marital discord did not, de facto, constitute a waiver of the clergy-penitent privilege. Therefore, even if the plaintiff had failed to refute the specific allegations made by the defendant rabbis in their

February 5, 1998, affirmations, a factual issue still remains as to whether she was in fact accompanied by a third person at all relevant times, and if so, whether under the circumstances she intended that the communications still would remain confidential. Accordingly, on this record, the disputed factual issue of whether the plaintiff waived the privilege cannot be determined as a matter of law. Simply stated, under no reasonable view of the record can it be concluded that the defendants established, as a matter of law, that the plaintiff intentionally waived the confidentiality privilege by brining third parties to her meetings with the defendant rabbis.

IV

Although the majority's conclusion that the plaintiff waived her privilege as a matter of law requires them to go no further, my disagreement with their conclusion as to that issue necessitates a discussion of two other significant issues

to reach what I consider to be the appropriate disposition of this appeal.

The defendants *have* seriously argued, from the start, that CPLR 4505 is a mere rule of evidence, and that a violation thereof is not actionable. While apparently no court in this State has sanctioned an action for a breach of this statute, it is clear that the law of New York does permit redress for breaches of confidence such as occurred herein.

In pertinent part, CPLR 4505 provides that "[u]nless the person confessing or confiding waives the privilege, a clergy [member] or other minister of any religion * * * shall not be allowed [to] disclose a confession or confidence made to him [or her] in his [or her] professional character as a spiritual advisor". While this statute had its origins in the Roman Catholic sacrament of Penance, it is nevertheless applicable to all clergy members as it "recognizes the societal value of encouraging communications" with the clergy for spiritual

advice (Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR, C4505, at 683). It should be liberally construed to carry out the policy behind it (*see, People v. Sinski*, 88 N.Y.2d 487, 646 N.Y.S.2d 651, 669 N.E.2d 809 [liberally construing physician-patient privilege]).

The clergy-penitent privilege is purely a creation of statute; it was unknown at common-law (*see, Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, 390 N.E.2d 1151, *cert. denied* 444 U.S. 887, 100 S.Ct. 181, 62 L.Ed.2d 118). The CPLR also contains other analogous privileges that protect communications between, inter alia, attorneys and clients (*see*, CPLR 4503), physicians and patients (*see*, CPLR 4504), psychologists and clients (*see*, CPLR 4507), and social workers and clients (*see*, CPLR 4508). The physician-patient privilege, among others, was also unknown at common-law (*see, Dillenbeck v. Hess*, 73

N.Y.2d 278, 539 N.Y.S.2d 707, 536 N.E.2d 1126). While courts from time to time have disagreed as to the reasoning, it is nevertheless well settled that the law recognizes the existence of a private right of action for damages for the benefit of a client or patient whose confidences have been betrayed by a health care professional (*see, Doe v. Community Health Plan-Kaiser Corp.*, 268 A.D.2d 183, 709 N.Y.S.2d 215; *Harley v. Druzba*, 169 A.D.2d 1001, 565 N.Y.S.2d 278; *Oringer v. Rotkin*, 162 A.D.2d 113, 556 N.Y.S.2d 67; *Tighe v. Ginsberg*, 146 A.D.2d 268, 540 N.Y.S.2d 99; *MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801). Such claims are generally sustained on a theory that the violation of the confidence constitutes a breach of a fiduciary or contractual duty (*see, Madden v. Creative Servs.*, 84 N.Y.2d 738, 622 N.Y.S.2d 478, 646 N.E.2d 780).

I need not repeat the reasoning expressed in my dissent in *Langford v. Roman Catholic Diocese of Brooklyn*, 27 A.D.2d 494, 70 N.Y.S.2d 661 concerning the availability of a cause of action for breach of fiduciary duty against a member of the clergy. In any event, the holding of *Langford* is not dispositive of the issues raised in the matter at bar. The instant plaintiff alleges discreet, intentional acts, absolutely prohibited by a clearly-worded statute. In Langford, the plaintiff asserted common-law fiduciary claims predicated upon her priest's violations of his duties of trust and confidence and his abuse of power, by seducing her as she came to him for counsel and solace. Characterizing Ms. Langford's causes of action as alleging clergy malpractice, the majority therein affirmed the dismissal of the complaint finding that inquiry into the parties' relationship would require the court to "venture into forbidden ecclesiastical terrain" (*Langford v. Roman Catholic Diocese of Brooklyn*,

supra). In the instant matter, certainly a determination of whether the defendant rabbis violated CPLR 4505 raises no similar concerns. Moreover, the defendant rabbis' alleged violations were admittedly intentional. The *Langford* majority did not dismiss the plaintiff's intentional tort claims on constitutional grounds, but solely on grounds of untimeliness. Thus, since *Langford* does not immunize the clergy from liability for intentional torts, it has no bearing on the defendant rabbis' alleged intentional acts in this case.

V

The other contention seriously advanced by the defendants is that they may not be held liable for fiduciary breaches flowing from their violation of the clergy-penitent privilege because they made their disclosures pursuant to Jewish law. As explained by the defendant Flaum in his affirmation of December 22, 1997, insofar as the plaintiff allegedly admitted "seeing men socially outside the

marriage" and "that she had stopped engaging in religious purification laws", he was affirmatively obligated, as a rabbi, to appraise Dr. Lightman thereof "to prevent [Dr. Lightman} from violating Torah Law". In essence, the defendants contend that notwithstanding the secular command of CPLR 4505 that "thou shalt not tell", in light of the nature of the confidences allegedly revealed by the plaintiff, Jewish law issued a contrary and overriding command that "thou shalt tell" (*cf., Kruglikov v. Kruglikov*, 29 Misc.2d 17, 217 N.Y.S.2d 845 [wherein the New York Board of Rabbis opined that "any confidence reposed in [a rabbi] by [a] husband or wife * * * who has come to him for counseling [may] not be divulged"]).

Courts have long struggled with issues of religious freedom and state regulation thereof. Prior to any discussion of that weighty issue, it is apparent that, as a matter of indisputable fact, the defendant rabbis' claimed justifications

for revealing the plaintiff's confidences to her husband are no more than transparent contrivances and red herrings.

Both of the defendants asserted in their affirmations in the matrimonial action that the plaintiff admitted that she had abstained from religious purification (mikva), so she did not have to engage in sexual relations with her husband, and they needed to warn Dr. Lightman to protect him. However, in his December 22, 1997, affirmation in support of the motion to dismiss, Rabbi Flaum averred "[m]ore that two years ago, Dr. Lightman told me that he and his wife were experiencing marital difficulties. He said that his wife was deviating from the laws and traditions of Orthodox Judaism and that he thought she was engaging in adulterous relations". Furthermore, Rabbi Flaum averred that the plaintiff had told him that she had stopped engaging in religious purification "which resulted in the cessation of all sexual activity with her husband". Thus, by Rabbi Flaum's own admissions, Dr.

Lightman *knew* that his wife was eschewing Orthodox rituals, he *believed* that she was having an affair, and *all sexual relations had ceased*. This set of facts clearly negates Rabbi Flaum's avowed need to reveal these matters to Dr. Lightman "to prevent him from violating Torah Law": Dr. Lightman *already knew what was going on*. From this perspective, Rabbi Flaum's intentionally destructive and arguably malicious revelations to Dr. Lightman were purely gratuitous and wholly unjustified under any circumstances (*see*, Miller, Silence is Golden; Clergy Confidence and the Interaction Between Statutes and Caselaw, 22 Am. J. Trial Advoc. 31, quoting Leviticus 19:16: "Thou shalt not go up and down as talebearer among thy people", at 66). The defendant Rabbi Weinberger made identical assertions in his affirmation of December 22, 1997, which are similarly unjustified.

In criminal cases we have held that police testimony in suppression hearings should not be credited where it has

obviously been fabricated and tailored to overcome legitimate constitutional objections (*see, People v. Lewis*, 195 A.D.2d 523, 600 N.Y.S.2d 272; *People v. Lebron*, 184 A.D.2d 784, 585 N.Y.S.2d 498; *People v. Miret-Gonzalez*, 159 A.D.2d 647, 552 N.Y.S.2d 958; *see also, Matter of Bernice J.*, 248 A.D.2d 538, 670 N.Y.S.2d 207; *Matter of Carl W.*, 174 A.D.2d 678, 571 N.Y.S.2d 536 [the latter two cases applying the above stated rule in juvenile delinquency proceedings]). In this case, the defendant rabbis have presented the converse argument. They have affirmatively tailored their affirmations so as to create constitutional objections to shield them from liability. However, their objections are transparent and unpersuasive on the facts of this case, and thus provide them no protection under the First Amendment.

The defendants' revelations via their affirmations in the matrimonial action were gratuitous and unwarranted for the same reasons. Even assuming that the plaintiff's eschewal of

the mikva or other alleged transgressions from Orthodoxy posed any genuine threat to the well-being of the children, such that it would be relevant on the issue of temporary custody, Dr. Lightman was certainly able to oppose the plaintiff's *pendente lite* application by raising these very same assertions from his personal knowledge. Whether or not the defendants' superfluous, derogatory affirmations had been "bought" by Dr. Lightman's "largess" and generous financial contributions as a transparent effort to embarrass the plaintiff as she alleged, it is nonetheless clear that they were duplicative, cumulative, and obviously unnecessary for the court's determination of the temporary custody issue. Once again, on the facts of this case, the defendants' "free exercise" justification defense is conclusory, illusory, and unconvincing.

Furthermore, insofar as the plaintiff is seeking to recover damages for the fiduciary breach that resulted from the

defendants' intentional violations of CPLR 4505, I am persuaded that this statute does not place undue burdens on their free exercise rights. The concept of separation of church and state is deeply imbedded in our law. The First Amendment to the United States Constitution commands, in relevant part: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof". The concept of "free exercise" is made up of two component parts; "freedom to believe and freedom to act". "The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" (*Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 84 L.Ed, 1213).

Where deemed appropriate and necessary, secular courts may resolve disputes involving religious issues (*see, Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed 876; *First*

Presbyt. Church of Schenectady v. United Presbyt. Church in U.S. of Amer., 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E.2d 454 , *cert. denied* 469 U.S. 1037, 105 S.Ct. 514, 83 L.Ed,2d 404; *Avitzur v. Avitzur*, 58 N.Y.2d 109, 459 N.Y.S.2d 572, 446 N.E.2d 136, *cert. denied* 464 U.S. 817, 104 S.Ct. 76, 78 L.Ed.2d 88; *Sieger v. Union of Orthodox Rabbis of United States and Canada*, NYLJ, Feb. 15, 2000 at 28. Col. 6).

Statutes impacting upon religious practices may be upheld because of the existence of a compelling state interest which justifies burdening the free exercise of religion (*see, Sherbert v. Verner*, 274 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965). In the alternative, more recently, the Supreme Court concluded that where a statute is a neutral law of general applicability and prohibiting the exercise of religion is not its object but only an incidental effect, the First Amendment is not offended (*see, Employment Div., Dept. of Human Resources of Oregon v. Smith, supra*; *see also, Matter of New York*

State Empl. Relations Bd. v. Christ the King Regional High School, 90 N.Y.2d 244, 248, 660 N.Y.S.2d 359, 682 N.E.2d 960; *Matter of [McMahon] Miller*, 252 A.D.2d 156, 684 N.Y.S.2d 368).

Applying either analysis, CPLR 4505 passes muster. It is a neutral law of general applicability, applied without distinction to all members of the clergy of all faiths and on behalf of all whom confide therein. Statutory violations may easily be determined pursuant to neutral principles of law rather than religious doctrine.

The compelling state interest underlying the enactment of CPLR 4505 has been noted by the Court of Appeals:

> It is clear that the Legislature by enacting CPLR 4505 and its predecessors responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized" (*Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226, 390 N.E.2d 1151, *cert. denied* 644 U.S. 887, 100 S.Ct. 181, 62 L.Ed.2d 118).

The defendant rabbis' challenge, if successful, would destroy the compelling interests served by the clergy-penitent privilege, as well as the viability of all evidentiary privileges within CPLR article 45. Any individual holding similar religious beliefs purportedly requiring revelation of confidential communications, could similarly defy the protection afforded under all other statutory confidences. Any individual, be it a lawyer, a doctor, or other relevant health care professional holding the same religious convictions, would be free to divulge confidences in the name of his or her religion. No privilege could withstand religious challenge.

Indeed, we are not even required in this case to weigh the compelling state interest in preserving privileged communications against the potential limited intrusion on the confessee's religious beliefs, since the clergy can easily protect itself against such conflict by simply warning

parishioners that their confidences may have to be divulged, thereby alerting them to seek other safer havens.

In short, the case before us illustrates the correctness of Justice Scalia's observations in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct 1595, 108 L.Ed.2d 876, that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate" (*supra*, at 878-879, 110 S.Ct. 1595). To conclude otherwise "'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect, to permit every citizen to become a law unto himself'" (*Employment Div., Dept. of Human Resources of Oregon v. Smith, supra*, at 879, 110 S.Ct. 1595, *quoting Reynolds v. United States*, 98 U.S. 145, 166-167, 25 L.Ed.2d 44). As such, under the facts at bar, the defendants do not mount a colorable free exercise challenge.

As the foregoing has demonstrated, subject to the defendants establishing their factual defenses at trial that the plaintiff waived her clergy-penitent privilege, the defendants had no legitimate business betraying her alleged confidences. Furthermore, the defendants' statutory breaches are actionable as they simultaneously constitute cognizable fiduciary violations. Finally, the defendants' religious justifications and constitutional objections are wholly specious. Accordingly, I would affirm so much of the order appealed from as upheld the plaintiff's first and second causes of action for breach of fiduciary duty, subject to the defendants proving their defenses at trial.

Supreme Court, Queens County, New York

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Carol Lightman,

Respondent,

v. March 4, 1999

Tzvi Flaum, etc, et al.,

Appellant.

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Congregant brought action against two rabbis alleging breach of duty of confidentiality, intentional infliction of emotional distress, and defamation, after rabbis disclosed confidential communications to congregant's husband and in divorce proceeding. On rabbis' motion to dismiss, which was converted to a motion for summary judgment, the Supreme Court, Queens County, David Goldstein, J., held that: (1) as a matter of first impression, rabbis' unauthorized disclosure of congregant's confidential communications, in violation of the

clergy-penitent privilege, was actionable; (2) First Amendment was not available as defense to rabbis; (3) congregant stated claim for intentional infliction of emotional distress; (4) fact issues precluded summary judgment on breach of fiduciary duty and emotional distress claims; and (5) alleged defamatory statements made in the context of the marital proceeding were absolutely privileged.

Motion granted in part and denied in part.

DAVID GOLDSTEIN, J.

ISSUE

This case presents an issue of first impression in this State, namely, whether the unauthorized disclosure of confidential communications, in violation of the clergy-penitent privilege provided by CPLR 4505, is actionable. The Court concludes, as a matter of law, that breach of the fiduciary duty of confidentiality does state a cognizable claim for relief.

Defendants, Rabbi Tzvi Flaum and Rabbi David Weinberger, have moved, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action. In accordance with CPLR 3211(c), this Court notified the parties of its election to convert the motion to one for summary judgment and all parties were afforded an opportunity to and did make additional submissions.

FACTS

Plaintiff alleges that, in 1995, she sought religious counseling from each of the defendants, during which she revealed certain matters of an extremely personal and confidential nature. Rabbi Flaum is employed as Rabbi of Congregation Kneseth Israel, 728 Empire Avenue, Far Rockaway, New York. He is also Chairman of the Vaad Harabonim, the Rabbinical Council of Far Rockaway and Lawrence and Co-Chairman of the Vaad Harabonim of Queens. Rabbi Weinberger is employed as Rabbi of Temple

Shaaray Tefila, 25 Central Avenue, Lawrence, New York. He was formerly Assistant Rabbi of Congregation Kneseth Israel and teaches at the Prospect Park High School and Seminary for Girls. Both plaintiff and her husband were members of Kneseth Israel and had also participated in services at Temple of Shaaray Tefila. According to plaintiff, she met with each Rabbi for advice and spiritual guidance and, in confidence, disclosed matters of a personal and intimate nature.

Subsequently, in February 1996, Mrs. Lightman commenced an action for divorce and moved for *pendente lite* relief, including temporary custody of the four children. In response, defendants submitted affirmations in support of the husband's position as to custody, which set forth the confidential matters that plaintiff had previously communicated and imparted to them. Specifically, the affirmation of Rabbi Flaum contained the following:

"2. Mrs. Lightman admitted to me that she stopped engaging in our religious purification laws since September 1995 and hence, all sexual activity has stopped by her own decision.

3. Mrs. Lightman admitted to me that she was seeing a man in a social setting and admitted, 'I am doing the wrong things.' I spoke to her and counseled her against this in December, 1995."

The affirmation of Rabbi Weinberger set forth the following:

"2. Mrs. Lightman admitted to me that she freely stopped her religious bathing so that * * * she did not have to engage in any sexual relations with Dr. Lightman.

3. She told me she was not getting fulfillment when I inquired what that meant, she simply answered, he doesn't relate to me. Nothing was stated that amounted to cruel conduct by Dr. Lightman.

4. Her religious behavior has changed. She does not want to adhere to Jewish law despite the fact that she is an Orthodox Jew and her children are being raised Orthodox as well. She has engaged in bizarre behavior.

5. I have no loyalty to either party except to state what I observed and to issue an opinion based on those observation[s] from a religious point of view."

Based upon the foregoing allegations, plaintiff commenced this action for violation of the clergy-penitent privilege and for intentional infliction of emotional distress. In addition, the complaint asserts a cause of action against Rabbi Weinberger for defamation.

Upon a motion to dismiss pursuant to CPLR 3211(a)(7), the court is required to construe the complaint liberally, accepting all of the facts alleged as true and affording plaintiff the benefit of any possible inference. (See, *Leon v. Martinez,* 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511.)

"[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one * * *." (*Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *see also, Foley v. D'Agostino,* 21 A.D.2d 60, 65, 248 N.Y.S.2d 121.) Upon a motion for summary judgment, it is incumbent upon the court to draw all reasonable inferences in favor of the non-moving party and it may not pass upon issues of credibility. (*See, Glick & Dolleck v. Tri-Pac Export Corp.,* 22 N.Y.2d 439, 293 N.Y.S.2d 93, 239 N.E.2d 725; *175 Check Cashing Corp. v. Chubb Pac Indem. Group,* 95 A.D.2d 701, 464 N.Y.S.2d 118.)

Upon the conversion of this motion to one for summary judgment, the parties submitted further affirmations. Essentially, plaintiff has reiterated the claims made in the complaint, alleging that it was both improper and actionable

for defendants to divulge privileged and sensitive communications which they had received from her.

In opposition, defendants contend that they were compelled by Jewish law to reveal the confidences to plaintiff's husband, his attorney and the court for the protection of both the husband and the children. Additionally, they argue that plaintiff was not seeking spiritual counseling or advice in what Rabbi Flaum describes as their "encounter" and both claim that a third person was present at the time: as to Flaum, plaintiff's mother and, as to Weinberger, plaintiff's friend, Yael Hirsh. According to Rabbi Weinberger, plaintiff described "the most intimate details of her marriage" in the presence of her friend, which surprised him. According to Rabbi Flaum, Dr. Lightman advised him that he and his wife were having marital problems--that she was deviating from Orthodox tradition and, he believed, was in "adulterous relationships." Weeks

later, plaintiff and her mother appeared at his office and berated him for speaking to Dr. Lightman. In the course of the heated exchange, plaintiff admitted "she had stopped engaging in religious purification laws" and was "seeing men in social settings even though she was still married to Dr. Lightman." Both defendants admit notifying the husband and claim that, in doing so, they were acting in accordance with their obligation as Rabbi and spiritual advisor and, further, that this was to protect the four "innocent" children of the marriage.

Defendants argue that the causes of action for violation of the clergy-penitent privilege must be dismissed since no private cause of action exists. They claim that breach of the privilege is merely a violation of an evidentiary rule, and that the sole remedy is the exclusion of the communication from evidence.

DISCUSSION

(a) *Fiduciary Duty of Confidentiality –*

Clergy-penitent privilege

While it is true that a cause of action does not automatically exist for breach of an evidentiary rule, our courts have repeatedly recognized that violation of certain privileges does give rise to a common law cause of action for breach of the fiduciary duty of confidentiality. (*See, Oringer v. Rotkin,* 162 A.D.2d 113, 556 N.Y.S.2d 67; *cf., Madden v. Creative Services,* 84 N.Y.2d 738, 744, 622 N.Y.S.2d 478, 646 N.E.2d 780.) Thus, a cause of action has been recognized for violation of the physician-patient privilege (*see, Doe v. Roe,* 190 A.D.2d 463, 599 N.Y.S.2d 350; *Tighe v. Ginsberg,* 146 A.D.2d 268, 540 N.Y.S.2d 99; *see also, Anker v. Brodnitz,* 98 Misc.2d 148, 152-153, 413 N.Y.S.2d 582, *affd.* 73 A.D.2d 589, 422 N.Y.S.2d 887, app. dismissed 51 N.Y.2d 703, 432 N.Y.S.2d 1026, 411 N.E.2d 795); the psychologist-patient privilege (*Oringer v. Rotkin, supra*); the

psychiatrist-patient privilege (*MacDonald v. Clinger,* 84 A.D.2d 482, 446 N.Y.S.2d 801); the social worker-client privilege (*Harley v. Druzba,* 169 A.D.2d 1001, 565 N.Y.S.2d 278 [as to scope of privilege in terms of confidentiality, generally, *see also, People v. Tissois,* 72 N.Y.2d 75, 531 N.Y.S.2d 228, 526 N.E.2d 1086; *Community Service Soc. v. Welfare Inspector General,* 91 Misc.2d 383, 398 N.Y.S.2d 92, *affd.* 65 A.D.2d 734, 411 N.Y.S.2d 188]); and the attorney-client privilege (*Krouner v. Koplovitz,* 175 A.D.2d 531, 572 N.Y.S.2d 959). Cognizable claims have been premised upon the breach of a fiduciary or contractual relationship.

Plaintiff acknowledges that an action for violation of the clergy-penitent privilege has not as yet been upheld and that the issue is one of first impression in this State and, as far as appears, in this country. However, by way of analogy to the foregoing privileges, she argues that the clergy has a similar

fiduciary duty *vis-a-vis* the penitent and should be held to the same stringent standard of care as has been imposed upon other professionals, namely, to hold such disclosures sacred and not to reveal confidential communications.

Plaintiff points to the care and diligence by most responsible members of the clergy in safeguarding confidences, as the reason the issue in this case has never arisen. In fact, this Court is aware of only one reported decision which squarely addressed the issue. In *Snyder v. Evangelical Orthodox Church,* 216 Cal.App.3d 297, 264 Cal.Rptr. 640, plaintiffs had confessed their adulterous relationship to certain members of the clergy. Although made in confidence, the confession was disclosed to others, including the assembled congregation, the Church Board of Elders and a gathering of priests, ministers, pastors and guests. Plaintiffs asserted claims, *inter alia,* for breach of fiduciary duty and infliction of emotional distress. In moving

to dismiss, defendants argued that the court lacked jurisdiction over conduct which was "ecclesiastical in nature."

The California Court of Appeal for the Sixth District held that, under certain circumstances, tort liability could be imposed upon a member of the clergy for revealing confidences. In doing so, it recognized that whether to allow such a claim involved substantial constitutional considerations relating to the First Amendment to the United States Constitution, and held that various factors needed to be taken into account, including whether the acts complained of were taken pursuant to church doctrine and whether the state interest outweighed any concomitant burden on religion.

In *Snyder, supra,* a four-pronged balancing standard was set forth to determine whether there is a justifiable burden on expression of religious belief in relation to the effect upon significant societal interests. To do so, the government must

be in furtherance of some compelling state interest; the burden on expression must be essential to further this interest; the type and level of the burden must be the minimum necessary to achieve the state interest; and the burden must apply to everyone, not merely to those who have a religious belief. In reversing the dismissal for lack of subject matter jurisdiction, the California appellate court remanded the matter for further proceedings, including a determination whether there actually was a religious purpose for the disclosure and, if it was concluded that the conduct qualified as religious expression, "* * * the trial court must balance the importance to the state of the interest invaded against the burden which would result from imposing tort liability for such a claim" (*Snyder, supra,* at 310, 264 Cal.Rptr. 640).

Previously, in *Wollersheim v. Church of Scientology of California,* 212 Cal.App.3d 872, 66 Cal.Rptr.2d 1, the

California Court of Appeal for the Second District applied the same balancing standard to uphold an action for intentional infliction of emotional distress, concluding in that case that there was a compelling state interest which far outweighed the values to be served by the alleged religious expression. In doing so, however, it observed that "* * * not every religious expression is worthy of constitutional protection" (*supra,* at 888, 66 Cal.Rptr.2d at 10).

In *Alexander v. Culp,* 124 Ohio App.3d 13, 705 N.E.2d 378 [Ohio App. 8 Dist.], plaintiff had met with defendant minister for marital counseling, whereupon he disclosed in confidence that he had several affairs during his marriage and was currently having an affair. Thereafter, Culp disclosed these confessions to plaintiff's wife and, after opining that plaintiff was a liar and not to be trusted, suggested that the wife obtain a restraining order, change the locks on the doors and retain counsel to secure a divorce. Since plaintiff also

stated he intended to take the children to another state, the minister suggested that she keep them away from their father. The Ohio appellate court found the factual allegations sufficient to state a viable claim for common law negligence, observing:

> "Public policy supports an action for breach of confidentiality by a minister. There is a public policy in favor of encouraging a person to seek religious counseling. People expect their disclosures to clergy members to be kept confidential. * * * Whether a particular case interferes with First Amendment freedoms can be determined on a case-by-case basis." (*Supra,* 124 Ohio App.3d, at 19, 705 N.E.2d, at 382.)

Although Ohio had a statute which prohibited the clergy from testifying as to confidences communicated during religious counseling, the provision had no application to any disclosure outside any legal proceeding. In holding that the

facts set forth a cognizable claim for ordinary negligence, not malpractice, the Ohio court observed: "Although the duty not to disclose arose from the clergy/parishioner relationship, the breach of the duty to preserve appellant's confidences neither involved nor compromised any religious tenets." (*Supra,* 124 Ohio App.3d, at 19, 705 N.E.2d, at 382.)

In our case, defendants claim that to sustain a cause of action would impinge upon the free exercise of their religious rights, preserved by the First Amendment. Generally, cases have held that the imposition of liability in tort or otherwise, for conduct or activities of a religious society or its members, in furtherance of religious beliefs, is barred where the imposition of liability would result in the abridgement of the free exercise of religion, in violation of the First Amendment. (*See, Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; *see also, Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich,*

426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151; *Paul v. Watchtower Bible & Tract Soc. of New York,* 819 F.2d 875 (9th Cir. 1987); *Kenneth R. v. Roman Catholic Diocese of Brooklyn,* 229 A.D.2d 159, 654 N.Y.S.2d 791; *Madsen v. Erwin,* 395 Mass. 715, 481 N.E.2d 1160.) The same holds true where the court would be required to become excessively entangled with religious doctrine and its standards. (*See, Schmidt v. Bishop,* 779 F.Supp. 321 (S.D.N.Y. 1991); *see also, Langford v. Roman Catholic Diocese of Brooklyn,* 177 Misc.2d 897, 677 N.Y.S.2d 436.) In such instances, it has been recognized that a court must refrain from determining ecclesiastical questions. (*See, Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed.2d 658.)

However, it is also well recognized that disputes involving religious entities may be adjudicated if this may be done by applying "neutral principles of law" and without

resolving or impinging upon underlying controversies over religious doctrine. (*Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra; Park Slope Jewish Ctr. v. Congregation B'nai Jacob,* 90 N.Y.2d 517, 664 N.Y.S.2d 236, 686 N.E.2d 1330; *First Presbyt. of Schenectady v. United Presbyt. Church in United States of Am.,* 62 N.Y.2d 110, at 119-120, 476 N.Y.S.2d 86, 464 N.E.2d 454; *see also, Jones v. Wolf,* 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775.) These and other cases hold that civil disputes involving religious institutions or persons may be addressed without offending constitutional restrictions, as long as neutral laws of general applicability are employed in the resolution or adjudication.

At the outset, it must be stressed that, while the First Amendment does prohibit the intrusion upon the exercise of religious beliefs, the conduct of a religious entity remains subject to regulation for the protection of society. (*See,*

Employment Div. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876; *see also, Cantwell v. Connecticut,* 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213; *Kenneth R. v. Roman Catholic Diocese of Brooklyn, supra.*) This is especially so where the imposition of liability or sanctions for the conduct complained of is secular in nature, namely, where liability is imposed equally, for religious institutions and parties, as well as for others, and where the basis for such liability may be determined without examination into religious law or policies. (*See, Employment Div. Dept. of Human Resources of Oregon v. Smith, supra; Jones v. Trane,* 153 Misc.2d 822, 591 N.Y.S.2d 927; *Moses v. Diocese of Colorado,* 863 P.2d 310.) Thus, the free exercise clause is not an absolute defense where, as here, liability for tortious conduct is sought to be imposed upon members of the clergy. It may only serve as a defense where the alleged tortious conduct was

undertaken pursuant to religious principles or doctrine. (*See, Kenneth R. v. Roman Catholic Diocese of Brooklyn, supra; Meroni v. Holy Spirit Assn. for the Unification of World Christianity,* 119 A.D.2d 200, 506 N.Y.S.2d 174; *Jones v. Trane, supra; Snyder v. Evangelical Orthodox Church, supra; Madsen v. Erwin, supra.*)

Even where the conduct is predicated upon religious beliefs, it may nevertheless form the basis for liability where significant societal interests are involved. (*See, Cantwell v. Connecticut, supra; Meroni v. Holy Spirit Assn. for the Unification of World Christianity, supra.*) Thus, it has been held that the intentional torts of the clergy may be actionable, notwithstanding the allegation that they are incidents of religious beliefs. (*See, Meroni v. Holy Spirit Assn. for the Unification of World Christianity, supra; Hester v. Barnett,* 723 S.W.2d 544; *Bear v. Reformed Mennonite Church,* 462 Pa. 330, 341 A.2d 105.) Other courts have sustained causes

of action against religious organizations for negligent supervision and retention, upon the ground that a liability determination would not require examination of any religious doctrine, nor would it inhibit any religious practice. (*See, Kenneth R. v. Roman Catholic Diocese of Brooklyn, supra; Jones v. Trane, supra.*) In such instances, the First Amendment will not serve as a defense because it is not implicated.

Based upon the foregoing legal principles, in determining whether the First Amendment is a viable defense, the threshold inquiry must be whether the complained of conduct is actually motivated by or involves religious practices or beliefs. (*See, Wisconsin v. Yoder, supra.*) If it is not, liability may be imposed without raising any constitutional inhibition or restriction. In such case, plainly, there is no entanglement with religion.

Under the circumstances of this case, it is concluded that a valid cause of action does exist under CPLR 4505, for breach of the fiduciary duty of confidentiality, which arises from the violation of the clergy-penitent privilege. Absent any religious or First Amendment implication, there is no compelling reason here to shield these Rabbis from liability in tort for revealing such sensitive, personal communications, when other similarly situated professionals are subject to potential liability under statutory provisions analogous in scope and purpose to that at issue here.

It is beyond peradventure that, when one seeks the solace and spiritual advice and guidance of a member of the clergy, whether it be a priest, rabbi or minister, on such sensitive, personal matters as those involved in our case, this is not done as a prelude to an announcement from the pulpit. On this record, it is equally clear that these protectors of the faith, under the guise of religious necessity, the protection of

the children and the sanctity of the marital institution, have taken upon themselves the disclosure to others of what, from its very nature and subject, was imparted in confidence, unless the privilege was waived by the presence of some third party or, from the nature of the meeting, the disclosure and communication was not made to the Rabbis in their spiritual capacity. (See, *People v. Drelich,* 123 A.D.2d 441, 443, 506 N.Y.S.2d 746.) And, not only were disclosures made to Dr. Lightman, both defendants readily acceded to his request that they be repeated to counsel and to the court in the matrimonial action, so as to influence the issue of temporary custody and/or visitation.

In my view, this was not only improper, it was outrageous and most offensive, especially considering the stature of these defendants within the community, a standard which they readily abdicated here. From what was done, it is palpably clear why this determination is one of apparent first

impression--no member of the clergy, with the possible exception of Reverend Culp in Ohio (*Alexander v. Culp, supra*), would dare breach the sanctity of his or her office to make public the type of confidential, private disclosures at issue in this case. And, while both profess that religious law "compelled" disclosure, to the contrary, both were bound by civil law, which mandated strict confidentiality. After all, the privilege belongs to the penitent, not the clergy, and must be honored.

Moreover, to violate such basic rights under the guise of religious necessity, conviction or the protection of the Torah is not only wrong, it is outrageous. Under the factual scenario admitted by these defendants, disclosure was not required to prevent Dr. Lightman from violating Jewish law or tradition. Both defendants knew that the couple was experiencing marital difficulties when they were told that plaintiff was no longer going to the Mikvah, the ritual bathing to purify the

woman during her menstrual period. Clearly, this is a peculiarly sensitive matter, not readily discussed with others, nor in open, public exchanges. Notwithstanding that future marital relations would cause Dr. Lightman to violate Jewish law, neither defendant had a "religious obligation as a Rabbi" to make public what had been imparted to them. In lieu of such, all that they had to do was ask the husband whether, notwithstanding their marital difficulties, the parties were still having normal relations. If so or, in the alternative, without such an inquiry, defendants could have emphasized to the husband the importance of ensuring that his wife was still going to the Mikvah. This, however, was not done. Moreover, as is apparent from Rabbi Flaum's affirmation of December 22, 1997, the disclosure was palpably unrelated to any religious doctrine, since what had been told to defendant was that "* * * plaintiff admitted that she had stopped engaging in religious purification laws *(which resulted in the*

cessation of all sexual activity with her husband) * * *"

(emphasis added). Thus, since he had been told there was no sexual relationship, there was no need for disclosure, especially under the pretext of preventing any violation of religious doctrine, unless this was to serve some other male, Orthodox, but equally irrelevant role.

Notwithstanding the foregoing, disclosure in this case hardly equates with the overwhelming public and societal interest in preserving the sanctity of such confidential communications. Plainly, there is no justification, religious or otherwise, for disclosing that plaintiff had been seeing men outside the marriage. The alleged negative impact upon the four children, in terms of "their level of religious observance as well as their general well being" (Affirmation, Rabbi Flaum, dated December 22, 1997), is so general that, in terms of importance, it cannot possibly measure against the overriding state and public interest in preserving

confidentiality. The same holds true with respect to the alleged "religious obligation" to prevent the husband from having relations with a woman "who admittedly socialized with other men" or, in terms of the children, "to shield them from their mother's improper conduct." To acknowledge such would improperly and unwisely create a standard for these defendants, as Orthodox Rabbis, different from that followed by the rest of society.

Thus, it is readily apparent here that the disclosure, under the circumstances of this case, is actionable and would entitle plaintiff to prevail on liability, unless the privilege had been waived by the presence of a third person, or the nature of the meeting was such that the communication was not made to the Rabbis in their spiritual capacity or to obtain spiritual guidance. (*People v. Drelich, supra*; see also, *People v. Carmona,* 82 N.Y.2d 603, 606 N.Y.S.2d 879, 627 N.E.2d 959.) Plainly, these are factual issues, which must await the

trier of the facts and are inappropriate for final resolution upon motion for summary judgment. As noted, inasmuch as neither defendant has identified any justifiable religious obligation or basis for revealing these communications, as a matter of law, the First Amendment is not a defense.

Equally without merit is the contention that, since the communications were revealed in the context of a judicial proceeding, they are entitled to protection. No authority or legal basis is offered to accord any degree of immunity for breach of fiduciary duty simply because it occurred in a judicial proceeding. While there is a valid basis for not permitting defamation claims to proceed and for immunity to be accorded defamatory statements made in the context of a judicial proceeding, those reasons are inapplicable here. If the privilege applies, plaintiff is entitled to confidentiality, whether it be in a sealed matrimonial proceeding or in a

public or private forum. The privilege belongs to and may only be waived by her.

Accordingly, upon the foregoing, the motion to dismiss or for summary judgment as to the first and second causes of action for breach of the fiduciary duty of confidentiality, is granted in terms of liability only to the extent of limiting, clarifying and defining the factual issues for trial, namely, whether the privilege had been waived by the presence of a third person, and whether the nature of the meeting was such that the communications and disclosures were made to the Rabbis in their spiritual capacity or to obtain spiritual guidance, and is otherwise denied.

(b) *Intentional Infliction of Emotional Distress*

The third and fourth causes of action sound in intentional infliction of emotional distress, and are alleged against both Flaum and Weinberger, respectively. To state a cause of action for intentional infliction of emotional distress, the

conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Fischer v. Maloney,* 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 373 N.E.2d 1215, quoting Restatement of Torts 2d § 46, subd. [1], comment d; *see also, Freihofer v. Hearst Corp.,* 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735, 480 N.E.2d 349.) The conduct must be of such a nature that it "* * * so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." (*Freihofer v. Hearst Corp., supra,* at 143, 490 N.Y.S.2d 735, 480 N.E.2d 349; *see also, Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232, 448 N.E.2d 86; *Fischer v. Maloney,* supra, at 557, 402 N.Y.S.2d 991, 373 N.E.2d 1215.) More must be involved than hurt feelings; mere insults, indignities, threats or annoyances are insufficient. (*See, Owen v. Leventritt,* 174

A.D.2d 471, 571 N.Y.S.2d 25, *lv. to appeal denied* 79 N.Y.2d 751, 579 N.Y.S.2d 651, 587 N.E.2d 289; *Lincoln First Bank of Rochester v. Barstro & Associates Contracting, Inc.*, 49 A.D.2d 1025, 374 N.Y.S.2d 485.) Intent or recklessness is an essential element of the cause of action.

In our case, plaintiff contends that the disclosure of privileged communications made to a Rabbi by a penitent, done with malicious intent, meets this stringent standard. This Court agrees. Bearing in mind the sanctity to be accorded such communications between clergy and penitent, and the necessity for confidentiality in conjunction with such spiritual counseling, without the fear of any reprisal or disclosure, it is both outrageous and intolerable that such communications would be revealed, even where, as here, this occurs in part in the context of a judicial proceeding. In my view, the conduct so transcends the bounds of decency as to

be regarded as both intolerable and atrocious, within the standard expressed in *Freihofer v. Hearst Corp., supra.*

Thus, the motion to dismiss the third and fourth causes of action for intentional infliction of emotional distress is denied. Although cognizable claims are stated, factual issues do preclude summary resolution, including, *inter alia,* intent or recklessness, a critical element of the cause of action and one which cannot be resolved on this record. Moreover, although the cause of action is one governed by a one-year statute of limitations (CPLR 215 [3]; *Gallagher v. Directors Guild of America, Inc.,* 144 A.D.2d 261, 533 N.Y.S.2d 863, *lv. to appeal denied* 73 N.Y.2d 708, 540 N.Y.S.2d 1003, 538 N.E.2d 355; *Goldner v. Sullivan, Gough, Skipworth, Summers & Smith,* 105 A.D.2d 1149, 1151, 482 N.Y.S.2d 606), the limitations issue has not been raised or addressed on this record.

(c) *Defamation*

The fifth cause of action against defendant Weinberger for defamation must be dismissed. The alleged defamatory statements were set forth in the affirmation of defendant, which was submitted in the context of the marital proceeding to determine temporary child custody. "A written statement * * * in the course of a judicial proceeding is absolutely privileged if, by any view or under any circumstances, it may be considered pertinent to the litigation." (*Joseph v. Larry Dorman, P.C.,* 177 A.D.2d 618, 576 N.Y.S.2d 588; *see also, Martirano v. Frost,* 25 N.Y.2d 505, 307 N.Y.S.2d 425, 255 N.E.2d 693.) Clearly, the statements were pertinent to the litigation in that they were intended to reflect upon plaintiff's fitness to be a good mother. Plaintiff claims that the statements fall without the scope of the privilege, since they must have been discussed and, therefore, published to her husband and/or his attorney prior to their having been

reduced to writing for submission on the motion. She contends that this publication is not subject to any privilege.

However, it is patently clear from the complaint that the statements, whenever published, were made "in connection with the above action for divorce." (Complaint, ¶ 66.) The absolute privilege is not limited to statements made or documents used in open court. (*See, Klein v. McGauley,* 29 A.D.2d 418, 288 N.Y.S.2d 751.) Thus, the statements are absolutely privileged since made for the purpose of litigation and may not be the subject of a claim for defamation. Accordingly, the fifth cause of action for defamation as against defendant Weinberger is dismissed.

CONCLUSION

Accordingly, upon the foregoing the motion to dismiss and for summary judgment is granted (1) as to the first and second causes of action, in terms of liability, only to the extent of limiting, clarifying and defining the factual issues

for trial, namely, whether the privilege had been waived by the presence of a third person, and whether the nature of the meeting was such that the communications and disclosures were made to the Rabbis in their spiritual capacity or to obtain spiritual guidance, and (2) dismissing the fifth cause of action for defamation as against defendant Weinberger, and is otherwise denied.